

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEANDREA SHAWN FREEMAN,

Defendant-Appellant.

UNPUBLISHED
November 1, 2005

No. 253553
Barry Circuit Court
LC No. 03-100230-FH
03-100306-FH

Before: Fort Hood, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Defendant, Deandra Freeman appeals by delayed leave granted his sentence of ten to fifteen years in prison imposed on his plea-based conviction of fourth-degree criminal sexual conduct (CSC) MCL 750.520e and his sentence of 24-48 months in prison consecutive to the CSC sentence in his plea-based conviction of escape aiding a prisoner, MCL 750.183. We affirm.

I. FACTS

Defendant was originally charged with first-degree criminal sexual conduct, MCL 750.520b(1)(f) and third-degree criminal sexual conduct, MCL 750.520d(1)(a). These charges stemmed from an incident where defendant used his finger to penetrate the vagina of a fourteen-year-old girl who was spending the night at his house. While jailed on these charges, defendant incurred a charge of escape aiding a prisoner, MCL 750.183, for his role in an attempted escape.

Defendant and the prosecution entered into a plea agreement. On October 3, 2003, during a hearing to waive the preliminary examination, the prosecution explained the agreement:

Thank you, your Honor. On the CSC file, we're gonna ask for the Court to permit an added Count 3, that being Criminal Sexual Conduct in the Fourth Degree, contrary to MCL – MCL 750.520(e), it is a two-year high court misdemeanor and/or \$500.

The – my understanding is the Defendant will plead guilty to the added Count 3, CSC 4th as a fourth habitual.

There is a Killebrew¹ sentencing recommendation of guidelines, sentencing within the guidelines.

The – it's my understanding the Defendant will be asking for a personal recognizance bond. We have no objection to that request provided Defendant pleads in both files and we're asking – we're gonna ask the Court to accept the pleas again. And unders – As part of the further understanding or other conditions providing the Defendant has no criminal violations upon release from the jail, no contact with the victims, and maintains communication immediately upon release regularly and in good f – and in good faith, we will take no position against Defendant's bond while he is released pending sentencing.

If the Defendant fails any of those conditions we may seek an immediate revocation of bond – I'll contact either one of the counsels, I won't do it ex-parte – and may charge absconding charges if the Defendant fails in any manner upon release. Our office will further make favorable recommendations if the Defendant shows good faith upon release from the jail prior to sentence.

Just – Count 1 and 2 would be dismissed as part of that plea agreement.

* * *

Thank you. In 306-FH (the escape charge), your Honor, the Defendant will plead as charged. There will – our office will not add habitual offender status in the event this matter does proceed to sentencing.

If this matter does proceed to sentencing, there would be no sentence agreement. However, if the Defendant complies as previously addressed, upon release from jail, prior to sentencing with no criminal violations immediate, regular and good faith communication upon release, and no contact with the victims in the CSC file, our office will motion for dismissal of the escape charge prior to sentence as part of this agreement.

If the Defendant fails in any manner, again, our office may seek immediate revocation of bond, contact with counsel, may charge absconding, and will ask the Court to proceed to sentencing in the escape charge with no sentence agreement. The Defendant's welcome to argue against the proofs in that matter.

Defendant then pleaded guilty to fourth-degree CSC and no contest to escape. The trial court accepted defendant's pleas, released him on a \$25,000.00 personal recognizance bond pursuant to the terms set forth by the prosecution, ordered defendant to maintain contact with the appropriate authorities following his release, and ordered him to appear for sentencing on October 30, 2003.

¹ *People v Killebrew*, 416 Mich 189; 330 NW2d 834 (1982).

Defendant failed to appear for sentencing on October 30, 2003. The trial court issued a bench warrant and defendant was apprehended the following day. On November 4, 2003 defendant was sentenced. At sentencing, defense counsel argued that defendant had complied with the plea agreement by maintaining contact with authorities, but that defendant had mistakenly believed that he was to appear October 31, 2003, the day after his actual sentencing was scheduled. Defense counsel asserted that defendant's failure to appear should not negate the plea agreement, but that the prosecution should add an absconding charge.

The trial court granted defendant an evidentiary hearing on the escape charge to determine whether he had maintained proper contact with authorities while on bond. The trial court then ruled that with regard to the CSC case, the Killebrew agreement did not apply because defendant had violated his plea agreement by not appearing for sentencing on October 30, 2003. The trial court then articulated substantial and compelling reasons to sentence defendant upward from the sentencing guidelines range of 5 to 46 months to 10 to 15 years.

On December 5, 2003 defendant filed a motion to withdraw his no contest plea to the escape charge. The trial court denied this motion and proceeded with a hearing to determine whether defendant had maintained appropriate contact with authorities while on bond. After testimony from Detective Yonkers, with whom defendant was supposed to maintain contact, and testimony from defendant, the trial court determined that defendant did not comply with the terms of his plea agreement. The court based this determination on defendant's failure to maintain appropriate contact with authorities and on defendant's failure to appear for sentencing. Thus, the trial court determined that the prosecution was not required to dismiss the escape charge. The trial court then sentenced defendant to 24-48 months in prison consecutive to the CSC sentence.

II. SENTENCE AGREEMENT

Defendant argues that the trial court lacked the authority to negate the plea agreement and that this Court should remand this case for resentencing in accord with the agreement, or in the alternative, defendant should be allowed to withdraw his plea. We disagree.

A. Standard of Review

The effect of a plea agreement is a question of law. We review questions of law de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

B. Analysis

A defendant who has not lived up to his part of a plea bargain has no right to specific performance. *People v Abrams*, 204 Mich App 667, 673, 516 NW2d 80 (1994). The trial court relied on *People v Kean*, 204 Mich App 533; 516 NW2d 128 (1994), as support for its conclusion that it was not required to adhere to the plea agreement in this case. In *Kean*, *supra*, this Court held that a defendant is not entitled to the benefit of a plea bargain/sentence recommendation, and a trial court is not required to allow the defendant to withdraw a plea if the defendant violated a specific condition of the plea agreement. *Id.* at 535- 536. Here a specific condition of the plea agreement was that defendant have no criminal violations. Defendant violated this agreement by absconding, that is failing to appear at his October 30, 2003

sentencing. Defendant's argument that he mistakenly believed that he was supposed to appear the following day is unpersuasive in light of the fact that this Court has previously held that conviction under the absconding statute does not require the specific intent to abscond. *People v Demers*, 195 Mich App 205, 208; 489 NW2d 173 (1992), citing *People v Litteral*, 75 Mich App 38, 43-44 n 2; 254 NW2d 643 (1977).

Here, the plea agreement contemplated that no intervening factors would occur between the plea and the sentencing. Thus, had defendant pleaded guilty and remained for sentencing and the court failed to follow the recommended sentence, we would have no problem remanding this case for specific enforcement on the plea agreement or to allow defendant the opportunity to withdraw the plea. However, this is not the case. Instead, we have an intervening event caused by defendant; he absconded prior to sentencing. Defendant implicitly waived his right to withdraw his plea by absconding and also provided a justification for a longer sentence than originally recommended.

Contrary to the argument presented by Judge Meter in his partial dissent, a review of the record in this case reveals that the prosecution set forth the conditions for a Killebrew agreement with sufficient specificity. The defendant was apprised of the sentencing pitfalls should he fail to uphold his responsibilities under the plea agreement.

A case that supports this reasoning is *People v Acosta*, 143 Mich App 95, 371 NW2d 484 (1985), remanded 425 Mich 883, 392 NW2d 1 (1986). In that case, the defendant failed to appear to enter his guilty plea and was arrested eight months later. This Court declined to enforce the original plea agreement stating that the prosecution was not bound by the agreement until defendant entered and completed his plea. We noted:

"Under this agreement, the prosecution was not bound until defendant entered and completed his plea. Although strict contract analogy may not be applicable to a plea agreement, *People v Reagan*, 395 Mich 306, 318; 235 NW2d 581 (1975), defendant did not live up to his part of the bargain when he absconded and failed to enter his plea. We decline to accept defendant's position that the bargain should be enforced irrespective of defendant's bad faith in failing to comply with the bargain by failing to appear. Although there was no explicit time limit or condition as to when or under what circumstances defendant could enter a plea, the requirement that defendant enter and complete his plea contemplated defendant's appearance to enter that plea. Defendant knew of the pending charges and the plea bargain, yet failed to appear on the date of the plea proceeding and was a fugitive for eight months. Under these circumstances, the court did not err in granting the prosecution's motion to void the plea agreement." *Id.* at 99.

The reasoning in *Acosta* supports the proposition that a defendant must abide by the contemplated terms of a plea agreement in order to seek enforcement of the agreement. Accordingly, we find that defendant has waived his right to withdraw his guilty plea in view of the fact that he absconded and prior to sentencing.

III. ESCAPE CHARGE

Defendant argues that the trial court erred in determining that the evidentiary hearing supported a finding that defendant failed to maintain contact with authorities while on bond and that the trial court should have dismissed the escape charge. We disagree.

A. Standard of Review

We review a trial court's findings of fact for clear error, giving regard to the "special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C); *In re Forfeiture of US Currency*, 164 Mich App 171, 179; 416 NW2d 700 (1987). A finding of fact is clearly erroneous if, after reviewing the entire record, we are left with a "definite and firm conviction that a mistake has been made." *People v Bolduc*, 263 Mich App 430, 436; 688 NW2d 316 (2004).

B. Analysis

Defendant's argument that his escape charge should have been dismissed is without merit. The trial court's factual findings on the issue of whether defendant maintained contact with authorities while on bond are not relevant. As discussed above, defendant clearly violated the plea agreement in another fashion; by absconding in violation of the requirement that he have "no criminal violations." Defendant was properly sentenced.

IV. UPWARD DEPARTURE FROM SENTENCING GUIDELINES

Defendant argues that the trial court abused its discretion in departing upward from the sentencing guidelines in imposing defendant's sentence of ten to fifteen years' imprisonment for fourth-degree CSC, fourth habitual offender. We disagree.

A. Standard of Review

A court may depart from the legislative sentencing guidelines range if it has a substantial and compelling reason to do so, and it states on the record the reasons for departure. MCL 769.34(3). In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination subject to review for clear error, the determination that the factor is objective and verifiable is reviewed as a matter of law, and the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Id.* at 269. In ascertaining whether the departure was proper, this Court must defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Id.* at 270.

B. Analysis

Factors meriting departure must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth. *Babcock, supra* at 257-258. To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). A trial court may not base a departure on an offense characteristic or offender characteristic already

considered in determining the guidelines range unless the court finds, based on facts in the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3).

Here, the trial court noted three reasons supporting the upward departure. First, defendant had been released from a prison sentence resulting from a conviction of third-degree CSC (person 13-15) only weeks before he perpetrated the CSC against the fourteen-year-old girl in this case. This indicated to the court that defendant was not capable of rehabilitation and continued to pose an unreasonable and unacceptable risk to the community. Defendant was not on parole at the time, so this was not factored into the sentencing guidelines. Second, the trial court stated that the sentencing guidelines did not consider the psychological injury to the victim's family. Third, the trial court noted that defendant actually committed third-degree CSC and that a sentence of ten to fifteen years would be within the guidelines for a third-degree CSC conviction.

The trial court's reasons for the upward departure are objective and verifiable. Further, the pattern of dangerous behavior evidenced by the previous and current offenses keenly and irresistibly grabs the attention. The obvious pattern to defendant's crimes indicates an impulsive proclivity that properly carried considerable weight in determining the appropriate length of defendant's sentence. Finally, this qualifies as an exceptional case to which the guidelines do not neatly apply. Therefore, the trial court did not abuse its discretion when it determined that there were substantial and compelling reasons to depart from the sentencing guidelines.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Bill Schuette